Before The
COPYRIGHT OFFICE
Library of Congress
Washington, D.C.

In the Matter of Rulemaking Notice and Recordkeeping for Use of Sound Recordings Under Statutory License	)	Docket No. RM 2002-1

JOINT COMMENTS OF COLLEGE AND UNIVERSITY RADIO BROADCASTERS
WEBCASTING UNDER STATUTORY LICENSE

The undersigned college and university broadcasting stations (the "College Broadcasters"), by their attorneys, file these Comments in response to the Copyright Office's *Notice of Proposed Rulemaking*, published at 67 Fed. Reg. 5761 (February 7, 2002) ("NPRM"). This proceeding concerns the requirements under the statutory licenses for webcasting in Sections 112(e) and 114(d)(2) of the Copyright Act, 17 U.S.C. Sections 112(e) and 114(d)(2). The Copyright Office has solicited public comment on the proposed changes to the interim regulations regarding (i) notice requirements and (ii) recordkeeping requirements. These Comments submitted by the College Broadcasters address only the recordkeeping requirements.[1]

For the reasons set forth below, the College Broadcasters strongly urge the Copyright Office to create a special exemption for a certain class of college radio stations from the proposed recordkeeping requirements set forth in the NPRM or, alternatively, to reduce the

[1] ***Do the College Broadcasters want to make any statement about the notice requirements?***

recordkeeping requirements for eligible non-commercial, non-CPB qualified college broadcasters webcasting under statutory license.

INTRODUCTION

The College Broadcasters are a geographically diverse group of noncommercial, non-CPB qualified, non-NPR member radio stations, licensed to various institutions of higher education throughout the United States.[2] These Comments relate exclusively to the statutory licensees for the simultaneous streaming via the Internet of the College Broadcasters' over-the-air broadcast programming. It is important to understand the background of the College Broadcasters, and college radio stations in general, in order to fully grasp the adverse impact of the recordkeeping requirements proposed by the Copyright Office in the NPRM. Critical to the continuing viability of the streaming activities of the College Broadcasters is the actual ability of the College Broadcasters to assume the newly increased costs of such activities.

The College Broadcasters report annual operating budgets ranging from $15,000 to $195,000 per year ***[Will R: Please provide the mean and median]***. Surprisingly enough, they are among the most well-funded college radio stations in the nation.[3] Financial resources available to college radio stations such as the College Broadcasters are limited, based on the noncommercial nature of the licenses granted by the Federal Communications Commission and restrictions in funding from parent institutions, many of whom are tax-supported state colleges or

[2] Only one of the College Broadcasters receives funding from the Corporation for Public Broadcasting (CPB) and as a result only one of the commenters is covered by the private agreement concluded between the Recording Industry Association of America (RIAA) and the CPB for CPB-qualified stations and NPR member stations. Radio station KUOM joins in submitting these comments out of solidarity for the College Broadcasters even though KUOM is a CPB-qualified and funded station.

[3] Please see Appendix A ***[the questionnaires]***.

universities.[4] Sources of funding for the College Broadcasters include student activity fees, underwriting and donations from fundraising.

As with most college radio stations, the College Broadcasters are staffed principally, if not exclusively, by student volunteers seeking creative outlets or developing the talents of their aspiring professional careers.[5] These student volunteers participate in the operation of college stations while at the same time maintaining their academic studies. As reported in Appendix A, the College Broadcasters employ from 0 to 2.75 ***[Will R.: Please provide the mean and the median]*** full-time paid professional staff. For many of the College Broadcasters, the single professional employee is also the engineer responsible for maintaining the station's technical facilities.

The diverse broadcast programming offered by the College Broadcasters typifies the broad range of programming available on most student-operated college radio stations. Consistent with the roles of their parent educational institutions, the College Broadcasters strive to explore unique programming and to cater to underserved niches of the community at large.

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[4] While there is little nationwide data describing the financial status of college stations, a recent study conducted of radio stations affiliated with thirteen institutions associated with the State System of Higher Education (SSHE) in Pennsylvania is indicative of the financial resources committed to such services. Eleven of the studied radio stations were licensed as broadcast stations and two operated non-broadcast services (such as carrier current stations). With respect to the licensed stations, the study reported that annual direct funding ranged from a low of $5,000 to a high of $50,000. Mean annual direct funding for such licensed stations was only $17,227. The study thus confirms that the College Broadcasters benefit from financial resources atypically high in relation to their peers. K. Dudt and B. Wilson (Indiana University of Pennsylvania), ***Title***, College Media Review, Winter 2001 ***[Will or Joel: Please insert complete citation]*** (the "SSHE Study").

[5] The SSHE Study reported that, of the eleven licensed stations, only two employed full-time personnel. In each of these two instances, a single full-time employee was assigned additional duties unrelated to the broadcast operation. The SSHE Study further indicated that the balance of the staffing was comprised of part-time faculty members (generally only one quarter-time faculty member each), students, and community volunteers from a variety of sources.

The College Broadcasters, like most college radio stations, are less likely than their commercial counterparts to utilize pre-programmed playlists of musical selections. Natural academic attrition provides another distinguishing characteristic of college radio stations: a constantly changing staff, which naturally leads to constantly evolving content. The College Broadcasters report extensive libraries of anywhere from 10,000 to 150,000 compact discs, tapes and phonorecords, consisting of a wide range of artists and musical genres (a number that is often increased by the personal libraries of student DJs).[6] These music libraries contain the sound recordings of nationally-recognized artists produced by national record labels as well as locally produced sound recordings of local performers and non-English language sound recordings of international artists. In addition, much of the programming offered by the College Broadcasters does not involve the performance of pre-recorded sound recordings. Rather, hundreds of hours of programming broadcast by the College Broadcasters provides news, public affairs, interviews, live music, other live performances and sports reporting.

Finally, the technical facilities and resources of the College Broadcasters are, for the most part, extremely basic, as one might expect. In addition, the service areas of their broadcast transmissions are normally very limited, in keeping with their overall operational capabilities.[7]

Each of these characteristics of the College Broadcasters directly relates to the reasonableness of the proposed recordkeeping requirements in the NPRM, as applied to student-operated noncommercial college radio stations. As further explained below, due to the relatively low operating budgets, lean staff and low technical capabilities of college radio stations like the

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[6] Some of the College Broadcasters report that they receive up to 77 new compact discs and phonorecords each week. ***[Will: Please provide example of sources.]***

[7] A 1995 study found that 56% of responding college radio stations operated in the 100 to 3,000 watt range. Only 29.8% operated above 3,000 watts. ***[National Association of College Broadcasters, Title, publisher (1995) Joel: Please provide the complete citation.]***

College Broadcasters, the adoption of the proposed recordkeeping requirements would clearly prove to be insurmountably burdensome for the College Broadcasters as well as all non-commercial, non-CPB qualified, non-NPR member college radio stations who were unable to join in these comments and make their views heard to the Copyright Office.

DISCUSSION

A. The Majority of the Requested Information is Not Readily Available to the College Broadcasters.

The proposed regulations would require statutory licensees to provide an "Intended Playlist," a "Listener's Log" and an "Ephemeral Phonorecord Log" for uses of sound recordings under Section 112(e). The Intended Playlist has been expanded from the requirements under the interim regulations to require eighteen (18) fields of information for each sound recording scheduled to be performed or actually performed. The Listener's Log, which did not exist under the interim regulations, requires seven (7) separate fields of information with respect to each individual user that connects to the webcasting service of the licensee. The Ephemeral Phonorecord Log, also new to the reporting requirements, requires thirteen (13) separate fields of information with respect to each phonorecord made of a sound recording under Section 112(e). Out of almost 40 fields of information requested, most of the College Broadcasters find that only the following fields of requested information would be readily available: name of the service or entity; channel, program or station identifier; the sound recording title; and, the featured recording artist.[8]

Much of the requested information with respect to the Intended Playlist is not consistently available to the College Broadcasters. For example, the College Broadcasters routinely perform sound recordings, including special broadcast singles and compilations, that

[8] See Appendix A.

are provided by the record labels themselves in advance of retail release. As a result, a substantial percentage of the sound recordings and compilations distributed to the College Broadcasters (and other college radio stations) display no catalog number, Universal Product Code or retail album title. In addition, the College Broadcasters, like most other college radio stations, make extensive use of catalogs comprised of historical sound recordings that were created before the advent of the International Standard Recording Code (ISRC) or Universal Product Code. The College Broadcasters, as with many other college radio stations, feature self-pressed or self-burned sound recordings made by the featured artists themselves; these sound recordings do not contain any of the retail information requested in the NPRM. Furthermore, historical and self-produced sound recordings typically do not provide complete copyright management information that is requested in the NPRM.

Due to the ad-hoc nature of the programming, the College Broadcasters do not have scheduled playlists and do not keep logs of actual playlists. As a result, the College Broadcasters are unable readily to provide the fields of requested information regarding date and time of transmission, duration of transmission and information regarding archived programs. Moreover, because the programming of the College Broadcasters represents wide and diverse ranges of musical genres, it is difficult for the College Broadcasters to identify their programs with one musical genre as required under the Intended Playlist.

With respect to the proposed Listener's Log, the College Broadcasters also report that the requested information is not typically available. Three (3) of the seven (7) proposed requirements refer to local time at the location of the user connecting to the Internet streams of the College Broadcasters. This information is currently not provided by contemporary Internet audio streaming systems. Moreover, the current schemes that are available do not assign unique

identifiers for users or listening sessions; one Internet Protocol (IP) address could conceivably represent more than one listener because of the use of proxy servers. Logs generated by present-day audio streaming software record a connection's IP address, which might be used to approximate the listener's country of origin. This information could be potentially misleading, depending on the nature of the listener's Internet service (e.g., a user of one ISP might be reported as a connection significantly different than the actual location).

The College Broadcasters generally report an inability to provide the information requested with respect to the Ephemeral Phonorecord Log. Ephemeral copies of sound recordings made to facilitate Internet transmissions of broadcast programming consist simply of buffer copies created in the temporary memory of the computer equipment used to encode and serve such programming. The software currently used by the College Broadcasters in conjunction with this process makes no discrete record of such files as they are created and destroyed. Technicians for the College Broadcasters uniformly report that present technology makes the collection of such information impossible. These ephemeral copies exist only momentarily and are each destroyed immediately after use. Given the Copyright Office's own recommendation "that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work," the requirements for the Ephemeral Phonorecord Log are clearly beyond what is reasonable.[9]

[Are the College Broadcasters able to comply with the requirement to report System Failures?]

[9] ***[Joel: Please provide a citation for this quotation.]***

B. The Majority of the Requested Information Does Not Fulfill the Stated Purpose of the Recordkeeping Requirements.

As indicated in the NPRM, both the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act instruct the Librarian of Congress to establish regulations that would require statutory licensees to give copyright owners reasonable notice of the use of their sound recordings and to create and maintain records of use and make such records available to copyright owners.[10] The NPRM indicates that the purpose of the recordkeeping requirements is (i) to allow copyright owners to monitor the use of their sound recordings and compliance with the terms of the licenses and (ii) to permit the copyright owners to receive their royalties as expeditiously as possible. In the NPRM, the Copyright Office proposes to adopt the recommendations submitted by the RIAA with respect to the recordkeeping requirements for both license because the requirements recommended by the RIAA "seems designed to accomplish the basic reporting objective of providing information with which copyright owners can generally monitor compliance with the terms of the licenses." The Copyright Office gives credence to the argument of the RIAA the requested information is "easily provided, [] not burdensome...." Contrary to the assertions of the RIAA, however, the majority of the information requested under the proposed recordkeeping requirements is not readily available and, moreover, does not serve the primary purposes of the recordkeeping requirements: ease of administration and monitoring of copyright compliance.

The College Broadcasters acknowledge that the following fields of information are necessary to facilitate administration of the licenses (including collection of royalties and expedited distribution of royalties to copyright owners): name of the service or entity, sound

[10] The Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995). The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

recording title, featured artist and recording label. For the reasons explored above, however, not all of this information is consistently available to the College Broadcasters for each sound recording performed.

Even if the information were readily available across the board, many of the fields of requested information are duplicative. For Internet retransmissions, the additional field of the station identifier is redundant with the name of the service or entity. In addition, with respect to simultaneous streaming of broadcast signals, the concept of a "channel" is inapplicable. The International Standard Recording Code (ISRC), catalog number, and Universal Product Code corresponding to a retail album are essentially unique numbers that describe the same product. Lastly, much of the requested information under the Ephemeral Phonorecord Log, were it feasible to record such data, would correspond perfectly with the information already required under the Intended Playlist.

With respect to monitoring compliance with the terms of the licenses, the College Broadcasters recognize that information regarding the sound recording, the release year, the featured recording artist, the retail album title, the recording label and the date and time of transmission can be useful to a copyright owner in monitoring compliance with the performance complement. Unfortunately, as described above, much of this information is not readily available with respect to each sound recording on a uniform basis. Copyright owners are not at a loss, however. All of the websites of the College Broadcasters are publicly available and can be readily monitored by copyright owners for compliance with the terms of the statutory licenses on a sampling basis, in the same way as under performance licenses for musical compositions (as further explored below). On balanced, the College Broadcasters believe that the reporting

requirements should be reduced to providing only the following data fields, on a sampling basis: the sound recording title, the featured artist and where available, the record label.

The College Broadcasters submit that the remaining fields of requested information have little or only tangential connection with the stated purposes of the recordkeeping requirements. The request of the RIAA for such information is an inappropriate method of obtaining free market research on the backs of the pioneers of a fledgling industry. As a result, it would be unfair to require the College Broadcasters and other non-for-profit noncommercial radio stations to subsidize the market research of profit-making (and profitable) record companies.

C. The Costs of Obtaining the Requested Information Exceed the Financial Resources of the College Broadcasters.

Each of the College Broadcasters has determined that existing finances would not allow them to cover the cost of complying with the proposed recordkeeping requirements. Recall, moreover, that the College Broadcasters are the most well-funded student radio operations. The College Broadcasters regularly struggle with fiscal difficulties and have restricted abilities to drum up additional funding to support the increased royalty and recordkeeping costs tied to streaming their broadcast signals on the Internet.[11] The College Broadcasters are non-profit, noncommercial organizations, many of which are state-funded, as they are part of state educational institutions which are supported by taxpayer money. Requiring College Broadcasters to comply with the proposed requirements would essentially take taxpayer money

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[11] In a preceding Copyright Arbitration Royalty Panel convened in _____, the panel observed that, while commercial broadcasters can pass along some portion of their costs to their advertisers, "[n]o comparable mechanism exists for Public [non-commercial] Broadcasters." RIAA Exhibit 220 DP-X at 24, CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823 ***(year)***. Unlike commercial broadcasters, "programming costs are not automatically accommodated through market forces." Id. ***[Joel: Please insert the complete citation.]***

away from educational initiatives and hand it over to the record companies. Moreover, as the budgets of the already financially strapped College Broadcasters are finite, increased costs for one activity will siphon away funding for other educational endeavors. Because the College Broadcasters are among the most well-funded college radio stations in the nation, the proposed requirements sound a death knell for the remaining college radio stations with even more limited resources. Compliance with the proposed recordkeeping requirements would have an observable adverse impact on the operating budgets of the College Broadcasters as they would require the College Broadcasters to devote their unknown amounts of their already limited financial resources towards (i) purchasing hardware and software to track, record and produce reports on the requested information; (ii) obtaining additional assistance for data entry of each field of information under the Intended Playlist and Ephemeral Phonorecord Log for each sound recording in a station's music library; (iii) providing technical support to maintain the servers and additional hardware required for compliance and to prevent loss of data; and (iv) ensuring overall compliance with the proposed regulations.

Compliance with the proposed recordkeeping requirements would require the use of computerized reporting systems that the College Broadcasters, like most other college radio stations, do not have. With respect to the Listener's Log, the College Broadcasters do not currently use such log analysis software in connection with their streaming activities. As a result, the College Broadcasters would be required to obtain log analysis software systems compliant with the standards proposed in these regulations. After investigation, however, the College Broadcasters have discovered that there are not any off-the-shelf software solutions

compliant with the NPRM recordkeeping requirements currently on the market and that the cost of developing a compliant software package would be prohibitive.[12]

The nature of the programming produced by the College Broadcasters makes real-time automated playback systems inappropriate, if not prohibitively expensive. As a result, the massive recordkeeping proposed in the NPRM would have to be generated manually by station personnel, as opposed to being automatically generated by a mechanized system, until an automated system were developed, paid for and installed. Until such time, the College Broadcasters would have to manually track and report eighteen (18) data fields per sound recording performed, thirteen (13) data fields for ephemeral phonorecords and seven (7) data fields per listener per sound recording performed per hour (which is from twelve to fifteen per hour), or up to 570 data fields per hour per listener of streaming.

In addition, because much of the requested information is not readily available, each College Broadcaster would have to devote valuable resources to researching the information requested with respect to each sound recording in its music library. Hours of data entry would then be required to create and maintain a database covering the requested information with respect to each sound recording title in the extensive music libraries of the College

[12] After contacting various vendors presently marketing software developed to study streaming server logs, the College Broadcasters have determined that no existing product will provide all of the information required by the proposed regulations. Moreover, it appears that no vendors are currently developing such applications. A representative from one software vendor opined that some of the requested information could not be derived from server reports because the requested information, particularly with regard to unique user and session identifiers and user time zone information, is not available from W3C compliant logs. This vendor estimated the cost of development of Listener Log compliant software at $7,000 - $10,000 per website. Another vendor reported that its software package was capable of providing information about listening duration, though not completely meeting the standards suggested in the NPRM, at a cost of approximately $3,000.

Broadcasters.[13] With staffs comprised of student volunteers and one or two full-time professionals at best (if that), the College Broadcasters do not have the basic manpower to cover the leviathan task of managing the enormous volumes of data requested. Requiring student volunteers to perform mind-numbing clerical tasks to comply with the recordkeeping requirements instead of performing music programming and DJ services would have an adverse impact on the number of students volunteering for college radio stations and their education experience. Finding the funding to cover the additional costs of such administrative duties, however, is next to impossible.[14]

Because of the programming diversity and extensive collections of the College Broadcasters and its college radio station peers, the burden of compliance (both in financial terms and manpower) with the recordkeeping requirements is measurably higher for the College

[13] College Broadcaster KTRU estimates 30,000 hours of data entry to enter the readily available data for the existing music library of approximately 25,000 compact discs and phonorecords. Maintaining the database would require another 1,000 hours on an annual basis. College Broadcaster, KFJC, reports that it has been trying to create a music library database identifying the featured artist, album title, record label and sound recording titles on the album, four of the requested data fields from the proposed recordkeeping requirements, over the past ten years. To date, it has entered only half of its music library as a result of error, crashes and resulting losses of data. College Broadcaster KDVS reports that it currently takes fifteen hours a week to enter limited information regarding approximately 75 new sound recordings received each week. In order to enter the additional required information, approximately 50 hours a week would be required. As its music library consists of more than 150,000 compact discs and phonorecords, KDVS estimates 97,000 hours to create a comprehensive database identifying all of the requested data fields.

[14] For example, College Broadcaster KDVS reports that the proposed recordkeeping requirements would triple the amount of work required to maintain the station. Currently, operating the station requires 320 hours of volunteer staff per work and 295 hours of paid staff work. Paid staff at KDVS receives a stipend, not an hourly rate, that amounts to about $3 to $5 per hour (below minimum wage). If KDVS were to pay minimum wage to its paid staff to cover the extra work generated by the proposed recordkeeping requirements, KDVS would need approximately $650,000 to add to its operating budget (which is at least four times more than its current budget).

Broadcasters and its college radio station peers.[15] Musicians, themselves copyright owners, already derive the benefit of extended exposure through performances on college radio stations like the College Broadcasters.[16] Given that the College Broadcasters, like most other college radio stations, have relatively low levels of listeners tuned to their Internet stations and as a result are likely to be paying statutory license fees close to the minimum levels proposed by the recent Copyright Arbitration Royalty Panel, the administrative costs of complying with the proposed recordkeeping requirements are unmistakably disproportionate to the royalty fees to be assessed.[17] Moreover, as described above, these costs are clearly beyond the financial resources of the College Broadcaster and their college radio station peers.

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[15] The College Broadcasters base this conclusion on the fact that commercial radio stations have active music libraries of only 500 to 2,000 sound recordings, the majority of which have been issued by a major record label (therefore are encoded with the relevant copyright management information and some of the other requested information), and create their music programming well in advance of play on automated systems.

[16] Also relevant to the position of the College Broadcasters is the guidance Congress provided the Librarian to consider "the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers." ***[Joel: Please provide a citation.]*** College radio stations feature up-and-coming artists and peripheral styles of music that otherwise would not receive public exposure; performances provided by college stations induce sales of the recordings of artists and musical genres that most need and desire to be introduced to the public. Student-operated radio stations also tend to program to an audience that is most likely to purchase music. The CARP Report determined that the promotional value associated with such performance is indeterminate, but that such a value exists cannot be denied. ***[Joel:Please provide a citation.]*** Copyright owners must consider the promotional value of the services provided by education radio stations like the College Broadcasters.

[17] The College Broadcasters operating in California report that most of their programmers develop playlists live, as the show is airing. These College Broadcasters change their airtime schedules every academic term. One of these College Broadcasters deletes six shows and adds six new shows per month. Most of the sound recordings are aired only once by a particular programmer during the academic term during which s/he is an on-air programmer. If a selection is repeated by a particular programmer, it may be weeks or months between play dates. As a result, if a College Broadcaster is required to keep a record of the sound recordings covered by the statutory licenses, such College Broadcaster will still have to expend considerably more than the two-hundredths of a cent per performance due the copyright holder in order to develop such a record. At the present time, the California College Broadcasters have an average of approximately five listeners per hour that tune to their music programming on the Internet. The

D. Unintended Consequences of Overly Burdensome Recordkeeping Requirements.

Each of the College Broadcasters reports that the excruciatingly high costs of compliance with the recordkeeping requirements alone (without factoring in the cost of the related annual royalty payments) would require each of the College Broadcasters to cease operation of their streaming activities. Shutting down the webcasting initiatives of the College Broadcasters would have the undesirable and unintended effect of depriving listeners of alternative sources of listening pleasure as well as depriving artists of alternative sources of exposure and, therefore, potential revenues. Moreover, an important avenue for education would be shut down. Clearly, terminating the streaming operations of the College Broadcasters would not serve anyone's interests, let alone the public interests or those of the copyright holders.

Internet retransmissions originated in association with noncommercial college radio stations are very much a part of the education of both the students participating in the creation of such broadcasts and of the audiences to the programs produced by these services. Early college radio stations were developed as experimental stations. Today, many radio stations operated from college campuses continue to be innovators in experimenting with new uses of existing technologies, in developing inexpensive applications for new technologies, and in offering programming to otherwise underserved audiences with content not typically provided by commercial counterparts. The further distribution of programming via the Internet is a natural extension of college stations' historical service. The near-universal availability of Internet resources on campuses allows college stations to fairly easily and inexpensively accomplish network retransmissions. These stations' further use and development of the Internet is consistent with the educational spirit under which the Internet was originally formed. Indeed,

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resulting royalty rate due on an annual basis (approximately $60 to $90 at most) would be disproportionately outweighed by the transactional costs of recordkeeping.

educational institutions have been a crucial part of the Internet since its inception. As the Internet has evolved, it has become even more vital to the development of students.

The College Broadcasters respectfully submit that the Copyright Office should not take a position that substantially and adversely impacts the present and future ability of creators and copyright owners to license the performance right as new technologies emerge. The College Broadcasters express legitimate concerns that the proposed recordkeeping requirements will effectively force the closure of their streaming operations and the streaming operations of their fellow college radio stations operating on even lower budgets. In addition to closing down avenues for exposure for musicians, such closures are certain to result in decreased revenues from Internet licensing for copyright owners. The enormous financial impact of the stringent and overburdensome recordkeeping requirements proposed in the NPRM will essentially have a chilling effect on the future of streaming activities in the college broadcasting world and will ironically diminish the stream of royalties that would otherwise be forthcoming.

F. The Copyright Office Should Create a Special Exemption from the Recordkeeping Requirements for the College Broadcasters.

1. Similarly Situated Licensees Already Have an Exemption from Recordkeeping Requirements under the Statutory Licenses.

In December 2001, the RIAA and the CPB concluded a private deal setting the terms and rates for webcasting by CPB-qualified stations and NPR-Member stations.[18] While the terms of this agreement between the CPB and the RIAA are confidential, according to the small amount of publicly available information about the agreement on the website owned and operated by the CPB, the RIAA has apparently granted to CPB-qualified educational radio stations with fewer

[18] See the CPB website located at www.cpb.org. More specific information regarding the deal, as referenced above, can be found at http://stations.cpb.org/musicrights.

than ten (10) full-time employees an exemption from the recordkeeping otherwise required from licensees streaming their over-the-air broadcast signals.[19]

In the February 20, 2002 decision of the Copyright Arbitration Royalty Panel (CARP) regarding the related proceeding for setting rates and terms for webcasting and statutory license, the CARP recognized that comparable agreements are the best benchmarks for determining fair rates for royalty payments: "The Panel believes that the quest to derive rates which would have been negotiated in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances."[20] While the CARP proceeding is separate from the NPRM, the College Broadcasters argue that similar reasoning should apply in this instance. The agreement voluntarily concluded between the RIAA and the CPB provides insight, with relation to the proposed recordkeeping rules, to the concerns facing other noncommercial radio stations. That the RIAA has granted an exemption from recordkeeping for certain noncommercial radio stations sets a precedent. If the RIAA recognized that the high transactional costs of compliance with the recordkeeping requirements were prohibitive for CPB-qualified stations, the Copyright Office can equally recognize a similar state of affairs at noncommercial non-CPB qualified, non-NPR member college radio stations, like the College Broadcasters, which are in an even worse

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[19] Upon information and belief, confidentiality of the terms of the agreement is a condition of the agreement. The College Broadcasters argue that such a term is arguably contrary to the intent of Congress with respect to the present proceedings. The Copyright Office cannot reasonably determine the reasonability of requirements for recordkeeping under statutory license without inclusive knowledge of such negotiated agreements. In light of the fact that the RIAA justifies its proposed recordkeeping requirements with the argument that other licensees are providing such information under negotiated deals, the Copyright Office should examine deals for similarly situated licensees.

[20] Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1 & 2 (2002). ***[citation.]*** ("CARP Report").

position as they are not receiving funding from the CPB and they are responsible for *both* administrative costs of recordkeeping *and* payment for the statutory royalty rates set by the CARP.

Although this NPRM proceeding is not about setting the rates and terms of the statutory licenses, the College Broadcasters submit that a corresponding reduction in the license fees should be made to fees due from noncommercial non-CPB qualified, non-NPR member college radio stations in the event that the Copyright Office grants the requested exemption from recordkeeping requirements. The CARP-recommended license fee for noncommercial broadcasters is one-third of the license fee for commercial broadcasters. In recognition of the reduced costs of administering a simplified noncommercial license, the College Broadcasters additionally request that the minimum license fee due under the statutory license be reduced by one-third for noncommercial non-CPB qualified, non-NPR member college radio stations.

In establishing a recommendation for a minimum license fee, the CARP notes that "one purpose of the minimum fee is to protect against a situation in which the licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties."[21] Adopting a minimum annual fee of $500, the CARP panel adopted the lowest fee negotiated by the RIAA under a previous voluntary agreement. This minimum fee is premised on a model designed to ensure the license administrator receives more in royalty fees than is the cost of administering the license. Similar reasoning would apply to the situation of the College Broadcasters. The RIAA, as the designated agent to collect and distribute statutory royalties, will benefit from a reduction in the cost of administering these licenses. The Copyright Office's stated intention in seeking public comments on these proposed recordkeeping

[21] ***[Joel: Please insert citation.]***

requirements is to "enable copyright owners to receive their royalty payments as expeditiously as possible." Because the recordkeeping requirements are intended to enable the implementation of a fee structure in the process of being finalized, it is natural to accompany any proposal to waive the reporting requirements for a specific class of services with a corresponding proposal for a reduced royalty fee for the same class of services. Additionally, given the savings in administrative costs for both the noncommercial radio stations performing sound recordings and to copyright owners of those sound recordings, the College Broadcasters believe the application of the minimum fee to these exempted services would be fair to all parties.

2. Alternatively, the Copyright Office Should Establish Narrowly Tailored Recordkeeping Requirements for the College Broadcasters.

Congress and the Copyright Office have previously recognized that the unique characteristics and special circumstances of college radio stations like the College Broadcasters merit special treatment. Section 118(d) of the Copyright Act, 17 U.S.C. § 118(d), allows for the performance of published nondramatic music compositions at special reduced rates by noncommercial radio stations which are licensed to colleges, universities and other nonprofit educational institutions and are not affiliated with National Public Radio. In this manner, college radio stations have obtained low-fee blanket performance licenses from the performance rights organizations, ASCAP, BMI and SESAC. 37 C.F.R. §253.5(c).[22] The recordkeeping requirements under this blanket license are equally reduced: "A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one

[22] For example, College Broadcasters from the University of California pay an annual fee of $244 to ASCAP and BMI and $66 to SESAC and are required to report to ASCAP and BMI the daily playlist of album, artist and sound recording title for up to three days per year during a random week selected by ASCAP or BMI. College radio stations pay additional performance royalties for the performance of musical compositions over the Internet.

calendar year request more than 10 stations to furnish such reports." 37 C.F.R. §253.5(e). In contrast to the census approach of the proposed recordkeeping requirements under the NPRM, these existing regulations applying to performances by non-NPR college radio stations like the College Broadcasters limit recordkeeping to a restricted sampling of performances from a small sampling of stations. If the performance rights organizations only need one week of sampling to distribute royalties collected from college radio stations and to allow copyright owners to monitor compliance with the license terms, it is difficult to understand why the RIAA or the designated collective would truly need the volumes of data requested with respect to each and every sound recording performed and every listener connected as proposed under the recordkeeping requirements in the NPRM.

CONCLUSION

For the reasons set forth above, the College Broadcasters strongly urge the Copyright Office to exempt the College Broadcasters and all noncommercial non-CPB qualified, non-NPR member college radio stations with fewer than ten full-time employees from the recordkeeping requirements proposed in the NPRM or, alternatively, to reduce significantly the recordkeeping requirements under statutory license in the manner set forth above.

Dated: April 5, 2002

Respectfully submitted,

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